BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

H. H. ADAMS AND OTHERS
(Claimants)
(See Appendices)

S.S.A. No. (See Appendices)

OWENS-ILLINOIS GLASS COMPANY
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-89
Case No. 69-3403

The claimants listed in the attached appendices A and B appealed from Referee's Decision No. LA-TD-60(SAC) which held that the claimants listed in Appendix A were ineligible for unemployment insurance benefits under section 1262 of the Unemployment Insurance Code through March 30, 1968, and that the eight claimants listed in Appendix B were ineligible for benefits through March 23, 1968 under section 1262 of the code. Written argument was submitted on behalf of the employer. No argument has been received from the claimants' representative or the Department.

STATEMENT OF FACTS

The employer maintains manufacturing and warehouse facilities in Tracy, California, at which it employs 145 hourly paid workers. They are all members of Local 177 of the Glass Bottle Blowers Association of the United States and Canada.

The hourly paid workers are covered by two separate collective bargaining agreements. Twenty employees are classified as "hot end" employees. They work in the forming department and are covered by the National Automatic Machine Department (NAMD) contract.

Preceding the period under consideration the Glass Bottle Blowers Association bargaining committee and the

Glass Containers Manufacturers Institute, Inc., representing the Libbey Owens manufacturing and warehouse units including Owens-Illinois Glass Company, the present employer, were negotiating a national NAMD contract. Negotiations had begun in February of 1968. The current contract was due to expire March 1, 1968.

Prior to March 1 the negotiators executed an extension agreement providing for 72 hours' advance notice before either side could take strike or lockout action. The extension agreement provided in addition that in the absence of 72 hours' notice the current contract was to continue on a day-to-day basis until a new contract was signed.

The remaining 125 employees at the Tracy facility were covered by a Production and Maintenance (P & M) contract which was not due to expire until March 31, 1968. (Two of these workers did not file claims for unemployment insurance benefits and were not subjects of the present litigation.)

On February 26, 1968 local management and union representatives met to discuss a proposal of the employer to keep the Tracy facilities open, providing employees with work in the event national negotiations reached an impasse. On this occasion the employer requested that if a strike occurred an outside contractor be allowed to enter the premises to perform maintenance on a furnace used in the production of its glass product. This job required draining and overcoating the furnace.

One witness, a claimant who was a "lehr foreman," testified that he recalled there was conversation before the anticipated strike concerning maintenance work on the furnace. Another, the employer's administrative supervisor, testified that once the furnace was drained, no further glass could be formed, and that the furnace had been operating without difficulty prior to the trade dispute and could have continued operating without breakdown. The furnace would have been shut down for normal maintenance within the next several months had the trade dispute not occurred.

With the likelihood of a strike by Local 177 imminent, the employer made arrangements to idle production, to place it on standby status. This would enable the plant to resume full production in several hours if employees reported for work in sufficient numbers to operate the equipment. Without such arrangements, and the plant shut down completely, there would be a 24 to 48 hour delay in the resumption of operations once the employees returned.

Local 177 members did begin a wildcat strike while national representatives of the parties continued negotiations. On March 1, 1968, 40 to 50 members of Local 177 established a picket line in front of the entrance to the road leading to the plant parking lot and the plant. The employer then posted notices at the intersection of the parking lot road and the public street outside the plant stating the plant was open and work was available. The notices urged all employees to report for work as usual. A similar sign was posted at the guardhouse on the plant property overlooking the employees' parking lot adjacent to the plant entrance.

Supervisory and other salaried employees were instructed to and did advise employees contacting them that the plant was open and that work was available. The employer left the plant and the entrance to the plant open on a 24-hour basis. Supervisory employees who were on duty for all three shifts were instructed to put anyone who reported for work to work. Time cards for hourly workers remained at their customary place and other operations including a food concession were maintained for employees' use.

Once it became apparent that the 20 NAMD hourly employees were not going to report for work, the employer made arrangements for the idling or standby plan. As each operation of the four stage glass production was shut down, the remaining glass was processed by the next stage until all of the glass then in use came through the line and was processed. The P & M employees on the last shift thereafter closed down the entire operation and left the plant. Subsequently, none of the hourly employees reported for work. These activities occurred on March 1, 1968.

On March 3 the employer mailed to all of its employees a letter signed by the plant superintendent explaining its view of the issues and suggesting that the union members consult their representatives with respect to the legality of their status. An offer was made to discuss individual problems with each member.

On March 6 a majority of the union members (NAMD and P & M) voted to reject the employer's request that the outside maintenance men be allowed access to the furnace.

Early during this period of the wildcat strike the Superior Court, County of San Joaquin, issued a temporary restraining order holding the strike illegal because of the violation of the no-strike clause in the extension agreement - the 72 hours' notice was never given. (The P & M contract also contained a no-strike clause.) No employees returned to work despite the employer's notification to them on March 3 that a temporary restraining order had been issued.

However, on March 7, 1968 substantial numbers of employees did enter the plant for the purpose of picking up payroll checks or making payments on insurance policies and to attend to other matters. Entry was made by them through the picket line and then through the watchman's office where one of the notices of available work had been posted by the employer. None of the six to eight union members who were maintaining the picket line after the first day obstructed their passage. In all other respects the union members maintaining the picket line were orderly and nonviolent.

Unemployment insurance benefit claims filed by the claimants cited various reasons for failing to report to work, including: Work was unavailable because the "hot end" NAMD workers did not report for work; violence was feared if the P & M workers attempted to cross the picket line; crossing the picket line would be contrary to their union principles.

Testimony developed no evidence that even a danger of violence existed. There were no threats of physical

violence or property damage except for one anonymous call received by an employee who himself worked behind the picket line on one shift but did not report after receiving the call. No probative evidence exists connecting the activities of Local 177 members with members of other unions in the Bay Area.

The Superior Court, County of San Joaquin, issued a preliminary injunction on March 21, 1968 enjoining interference with the employer's operations until the requisite 72 hours' notice was given in accordance with the extension agreement. The provisions of the injunction were substantially the same as those contained in the temporary restraining order earlier issued by the court and, according to the president of Local 177, a machine operator employed at the plant in Tracy, were no different in effect.

This witness also testified that by March 21 or March 22, 1968, he was aware that if maintenance of the furnace took place it would require a suspension of production. He further testified that telegrams received by him kept him apprised of progress being made on the national contract and that he had traveled back and forth to Atlantic City where negotiations were being conducted. Telegrams show conclusively that the earliest the members would return to work once agreement was reached would have been March 29, 1968.

On March 22 the plant superintendent advised all employees of the contents of the preliminary injunction. The employees were told that the picket line was to be removed. They were also informed of the employer's intention to drain the furnace on March 22, and to proceed with its maintenance "depending upon the availability of contractor's labor, the repair should be completed and the tank returned to normal operation in about ten days."

The evidence before us results in the finding that from March 1 until March 22, 1968 the employer was compelled to idle plant operations to prevent damage to its equipment and to ensure full production on short notice. Other work of a housekeeping nature was available during this period, including repacking, reselecting of bottles,

"stripping the warehouse," painting, parking lot maintenance and cleanup. An open door policy was maintained by the employer, but Local 177 representatives made no overtures to return to work on behalf of the union membership.

The furnace maintenance began as soon as pickets were removed. The furnace was ready for full production on April 4, 1968. The employer's administrative supervisor testified that had the striking P & M workers returned to work, supervisory employees could have operated the critical forming machines in the absence of the NAMD "hot end" workers. The implication is that the furnace would not then have been shut down completely.

There is no evidence that the employer, when it began the furnace maintenance on March 22, was aware that settlement of the trade dispute was imminent (six days later, on March 28).

On the evening of March 23, 1968 a meeting of Local 177 members took place, followed by the reporting to work on March 24 of six NAMD workers.

The record does not disclose what took place at the meeting. A discussion did ensue, however, as to whether members of Local 177 should return to work. The employer's administrative supervisor stated without contradiction that the March 22 letter sent by the employer with respect to the preliminary injunction and furnace "repair" probably was received by the membership in the ordinary course of mail on March 23, 1968.

On March 25 another six NAMD employees reported for work. The following day they began calling in sick, or not reporting at all. The consensus of testimony as to the latter group was that, despite their possible utilization for housekeeping chores at the current P & M contract rate, they became dissatisfied over their purportedly low pay.

The eight P & M workers listed in Appendix B who reported to work on March 24 at the employer's

invitation worked four days on housekeeping chores and were laid off for lack of work on March 27 and 28, 1968. During this period in March, nothing changed at the national level. Negotiations were still at an impasse.

The negotiations were finally concluded on March 28, 1968. The furnace maintenance which had begun on March 22 lasted 14 days and did not end with full resumption of production until April 4, 1968. Following the termination of negotiations and signing of the national contract the employer attempted to recall workers as needed. It could not use them sooner because the furnace maintenance precluded a full schedule of work for all employees.

It is the employer's contention that the trade dispute remained in active progress at least until Thursday, March 28, 1968, when the NAMD national contract was agreed to. The crux of the employer's position is that all members of Local 177, notwithstanding their reporting to or return to work prior to that time, were still involved in the trade dispute and that most of the members of Local 177 who did offer their services prior to settlement of the dispute did so in bad faith and with knowledge that the employer, having been forced until March 22 to defer the furnace maintenance, would not be in a position to immediately provide full employment once maintenance began.

Moreover, the employer contends that because postponement of the furnace maintenance was due to the voluntary act of the entire union membership in refusing the contractor earlier access to the plant so that the maintenance could be accomplished during the period of national contract negotiations, the claimants should bear full responsibility for the resultant delay in their return to work beyond settlement of the national agreement, or, as we construe this argument under the rule laid down by us in Appeals Board Decision No. P-B-18 and sections 1253 and 1253.2 of the California Unemployment Insurance Code, through the week ending Saturday, April 6, 1968.

In all respects the employer is contending for both an objective (the claimants' voluntary decision not to permit the furnace maintenance before March 22, 1968)

and subjective (the absence of any bona fide intention to return to work) basis for the conclusion that the trade dispute did not terminate until Thursday, April 4, 1968.

Questions raised by the facts and argument are:

1. What was the cause of the claimants' unemployment; were they out of work "because of a trade dispute" or merely during the trade dispute? While always the key question, it takes on especial significance in the instant case because of our seeming departure from what our dissenting colleagues characterize as the "authoritatively established" body of law which says we must remain neutral in our review and analysis of every trade dispute.

2. Do the circumstances surrounding the return to work of the NAMD workers who returned for for one or two days' duration admit of an inference that they did so in bad faith?

3. Did the P & M workers who failed to return to work become disqualified from receiving benefits during the week ending March 30, 1968, since the national contract was not concluded until March 28, or were they disqualified an additional week because the employer could not resume full production until the furnace maintenance had been completed?

4. Did the eight P & M workers listed in Appendix B also lose their entitlement to benefits despite their return to work and their employment until laid off for lack of work because, as members of Local 177 with a community of interest in the outcome of the trade dispute, they prolonged their own unemployment due to the employer's inability to resume full production?

REASONS FOR DECISION

It is not entirely clear on what ground the employer would have us disqualify the eight claimants listed in Appendix B attached to this decision, but from its written argument it would appear it intends that we do so by accepting the premise that as members of Local 177 they should automatically be painted with the same disqualifying brush which has rendered their fellow union members ineligible for benefits through March 30, 1968.

However, even jurisdictions which do not accept the volitional and causational tests (see Ruberoid Company v. California Unemployment Insurance Appeals Board (1963), 59 Cal. 2d 73, 27 Cal. Rptr. 878, 378 Pac. 2d 102) but go by way of the "work stoppage" rule, do not render claimants ineligible from receiving unemployment insurance benefits when they are recalled to work during a labor dispute and are subsequently laid off for lack of work.

In General Motors Corporation v. Unemployment Compensation Board of Review (1967), Benefit Series Service, 1968, Extracted Decisions, Reported 214-17, LD-350.55.31 (affirmed November 14, 1967, Pennsylvania Supreme Court, Western District, unpublished) the court had before it section 402(d) of the Pennsylvania law which (since 1947) speaks of the ineligibility of claimants for benefits if their unemployment is "due to a stoppage of work which exists because of a labor dispute." In that case, a work stoppage occurred on September 25, 1964. A national agreement was signed on November 9, 1964. During the interim, on October 24, the claimant's local and his employer agreed to open the Pittsburg plant on the basis of the old contract since all local issues had been settled except checkoff. The employees were recalled to work. The employer had planned to recall all of them but due to its inability to get into full production, those with more seniority bumped those with less, including the claimant who was laid off on October 28, 1964. The question before the court was whether the claimant was entitled to benefits from October 28 to November 9, 1964.

Referring to the factual matrix at time of separation as determinative of whether his unemployment was due to no fault of his own and expressing the public policy that no private agreement between an employer

and a union could operate as a waiver of the claimant's right to unemployment insurance benefits which he was otherwise entitled to receive, the court stated that those workers who were not merely idled by the strike but who were recalled and then laid off as was the claimant were entitled to benefits as of the latter date. This reasoning is sound. We hold likewise. The eight claimants listed in Appendix B attached hereto are not disqualified beyond March 23, 1968.

We now turn our attention to the numerous other claimants whom we believe were properly disqualified for benefits through March 30, 1968. These are the claimants listed in Appendix A attached to this decision.

Section 1262 of the California Unemployment Insurance Code provides that a claimant is not eligible for unemployment insurance benefits "if he left his work because of a trade dispute." The provision continues that benefits shall not be paid to a claimant "for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

Section 1262 of the code requires that our inquiry be directed towards ascertaining whether (1) there was a trade dispute; (2) whether the claimants in each of the groups above mentioned left their work because of the trade dispute; and, (3) whether and for how long the claimants in each of the groups continued out of work by reason of the fact that the trade dispute was still in active progress.

The mere lack of approval for strike action from a union's international headquarters should not prevent the action of duly elected, authorized and responsible local officials, herein Local 177, from being the voluntary action of the members of the local. (Artigues v. California Department of Employment (1968), 259 Cal. App. 2d 409, 416-417, 66 Cal. Rptr. 390 citing Gardner v. State Director of Employment (1959), 53 Cal. 2d 23, 345 Pac. 2d 193; Thomas v. Calif. Employment Stabilization Com. (1952), 39 Cal. 2d 501, 247 Pac. 2d 561; McKinley v. California Employment Stabilization Commission (1949), 34 Cal. 2d 239, 209 Pac. 2d 602;

Bodinson Manufacturing Company v. California Employment Commission (1941), 17 Cal. 2d 321, 109 Pac. 2d 935; and General Motors Corporation v. California Employment Insurance Appeals Board (1967), 253 Cal. App. 2d 540, 61 Cal. Rptr. 483) Reasoning from circumstances in the instant case leads us to the conclusion that wildcat strike action by Local 177 was the voluntary action of all members of the local. A trade dispute, therefore, existed at the establishment in Tracy where these members were employed as of March 1, 1968.

The major remaining questions in this case, namely, whether the claimants left their work because of the trade dispute and whether and for how long they continued out of work because of the trade dispute, are answered by an application of the principles enunciated by the Supreme Court of this State in the Bodinson, Gardner and McKinley cases cited above.

The first pronouncement of the Court in 1941 enunciated the principle that disqualification under the code depended upon the fact of voluntary action and not the motives which led to it. Bodinson established the "volitional test" in trade dispute cases by holding that to be ineligible for benefits, the unemployment of a claimant must result from his own voluntary act, not from the acts of others. (17 Cal. 2d at page 328)

In the second case, Gardner, the Court applied the "first blow" rule, stating that it ". . . works impartially as to both employes and employers and puts each group on notice that the one which creates and first applies the economic weapon /strike or walkout/ in a trade dispute . . . may have to bear responsibility for foreseeable reprisals." (53 Cal. 2d at page 30)

Ten years earlier, in McKinley the Supreme Court had spoken of the circumstances under which eligibility or ineligibility was to be determined. An association of bakers had bargained for years with a labor union and had entered into a master collective bargaining agreement signed solely by the union and the secretary of the association. When negotiations broke down and a strike threatened, an association member notified the

union that a "strike against one member would be considered a strike against all." When one plant was struck, all association member plants closed.

The union contended that the employees in all plants but the one struck plant had been locked out, that their unemployment was involuntary and that they were eligible for benefits. In denying them benefits, the Supreme Court stated in part: "The volitional test itself is based upon a just analysis of a substantial subjective element and it cannot properly be extended or perverted by insistence upon mere form." (34 Cal. 2d at page 245)

In making a similar analysis, we have been admonished to avoid deciding ineligibility upon the merits of the controversy or dispute between employer and employees. (W. R. Grace and Company v. California Employment Commission (1944), 24 Cal. 2d 720, 151 Pac. 2d 215) Section 1262 thus appears to express a policy of state neutrality in trade disputes so that striking workers do not receive the equivalent of strike benefits from the Unemployment Fund.

This board, however, has recognized that a policy of strict neutrality would impair our functioning in the role forced upon us by the legislature; that we must analyze the underlying circumstances leading to a claimant's unemployment; that to do otherwise is to forfeit the responsibility reposed in us by the legislative policy expressed in section 100 of the code that benefits be paid to claimants who are "unemployed through no fault of their own." In do soing, we have followed the rationale of McKinley, supra, in which inquiries were made into the merits of a trade dispute in order to distinguish between the claimants' leaving during the course of the trade dispute and their leaving because of the trade dispute. This approach is no less efficacious in the instant case.

Most recently in Appeals Board Decision No. P-B-16, we looked behind form to substance when we examined the circumstances surrounding the unemployment of claimants who had breached a no-strike clause in their collective bargaining agreement. In that case, we distinguished the underlying facts in Grace, supra, by noting that

"in that case the court was only concerned with the claimant's right to effectively certify for benefits during the progress of the trade dispute." Further, we stated at page 6:

> ". . . Section 56(a) (now section 1262) reflects a clear intent on the part of the legislature that, with respect to the actual period of industrial conflict, individuals who left their work because of a dispute are not eligible to qualify for benefits. We do not understand the court in the Grace case to say more than that. Further, we find nothing in that case which would answer the question whether the so-called neutrality policy towards industrial disputes applies where, as in the present case, the parties have voluntarily bargained away their right to resolve such disputes by the usual weapons of collective bargaining - the strike and the picket line."

Had the employer in the instant case discharged the claimants for their patent breach of the no-strike provision in the extension agreement, a breach more reprehensible in our judgment than that in Appeals Board Decision No. P-B-16 because of the claimant's flagrant disobedience of the temporary restraining order, these claimants as those in the earlier case would have been deemed discharged for misconduct under section 1256 of the code.

The claimants in the instant case were persistent in their unauthorized, illegal wildcat strike. In our opinion, those claimants listed in Appendix A were ineligible for benefits through March 30, 1968 under section 1262 of the code. These claimants either actively continued to picket the establishment at which they were employed or refused to cross the picket line, although cognizant that work was available and that the employer welcomed their return to their jobs. There was no valid reason submitted for failing to return. They did nothing to abandon strike action. The clear preponderance of evidence is that no violence existed or should have been feared and their

refusal to cross the picket line was a decision consciously taken by the P & M workers solely out of sympathy with the NAMD workers in obedience to their union scruples and in disobedience of an order of the court.

There is no probative evidence to suggest, moreover, that those NAMD workers who returned to work for short periods only to call in sick or proffer other excuses for their absences had returned to work in good faith. Any offers to return to work or actual return to work by any claimants in either of the two groups was not unconditional or unequivocable but, in our opinion, was a subterfuge to conceal their true purpose in remaining out of work until settlement of the national contract. (See Great Atlantic & Pacific Tea Company v. Perluss (1961), Memorandum Opinion (unpublished) in Civil No. 770428, Superior Court, Los Angeles County) To be eligible for benefits a claimant's conduct must not be merely "a device to circumvent the statute." (Mark Hopkins v. California Employment Commission (1944), 24 Cal. 2d 744, 748, 151 Pac. 2d 229)

Again, we would be abandoning our duty to properly administer the law if we were to avoid examining the dynamics of the situation confronting the employer and failed to conclude that its draining and overcoating of the furnace was anything but an economically prudent act during continuation of the trade dispute. In earlier refusing to allow the employer the opportunity to perform furnace maintenance, the claimants were creating the conditions for their subsequent unemployment, just as the pressers in a dry cleaning establishment in Benefit Decision No. 6070 who had refused to handle garments from struck establishments in obedience to their union principles of not handling "hot cargo" ultimately caused the employer's layoff of the remaining employees (accord, Benefit Decisions Nos. 6071 and 6072); and, just as in Benefit Decision No. 6026, when we held that the minority of claimants who removed their personal tools and equipment from the employer's premises contrary to their former practice risked the unemployment of all employees because removal made normal operations impossible and that the employer's seemingly "last act" of laying all off due to a lack of work was not the real cause of their unemployment, so too in the instant case it would be fallacious to view the employer's "last act" of shutting down

operations for the draining and overcoating of the furnace on March 22 as the efficient reason for the claimants' unemployment beyond March 30, 1968 when its earlier request to perform this maintenance was denied by majority vote of the union membership. Permission earlier granted would have resulted in earlier resumption of operations and the full employment of all employees. This we submit can be the only realistic approach to the claimants' unemployment until April 4, 1968 because their earlier refusal was part and parcel of the trade dispute, made such by the party who struck the first blow. (Gardner, supra, at pages 243-249)

That the claimants both "willed and caused" their unemployment, Ruberoid, supra, at page 77, may be seen by the circumstances of the union's initial disdain for the temporary restraining order until receipt of the employer's letter of March 22, 1968 informing them of its intention to begin furnace maintenance and their then curious action in terminating strike action in compliance with the preliminary injunction, which itself was but a reaffirmation of the court's earlier finding of the illegality of that strike action. Coupled with these actions is the fact of the meeting of the local union membership on the evening of March 23 followed by purportedly good faith offers to return to work. The inability of the employer to offer full-time regular employment was the direct and foreseeable result of all these actions and the claimants' unemployment through the week ending April 6, 1968 was due to their continuing fault in prolonging the trade dispute.

DECISION

The decision of the referee is modified. The claimants listed in Appendix A are ineligible for benefits under section 1262 of the code through April 6, 1968. The eight claimants listed in Appendix B are ineligible for benefits through March 23, 1968.

Sacramento, California, December 10, 1970

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS

DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

The majority of the board has predicated its extension of the trade dispute disqualification of all but the eight claimants listed in Appendix B on the illegality of the wildcat strike. The claimants' concededly en masse decision to deny the employer the opportunity of performing routine maintenance upon a furnace which needed no repair during the active progress of the trade dispute prior to its settlement at the national level has been turned against them. This act is pictured as the proximate cause of their continued unemployment beyond national settlement and until full production could be resumed as a result of management's independent decision to completely shut down operations.

Such a holding gives the employer a favored position vis-a-vis the claimants, a result which does insult to a large body of law authoritatively established in this jurisdiction. It makes this board an accomplice to the virtual abolition of benefits to worthy claimants in almost all trade dispute cases. We do not intend to be a party to this holding.

Our colleagues have set forth their opinion of the issues before us. We prefer to posit the following:

1. Was the employer's complete shutdown of operations for furnace maintenance unrelated to the strike action originally taken voluntarily by the Local 177 membership and, though coming before national agreement, tantamount to a lockout?

2. Related to this is the ancillary question of whether, given the claimants' original voluntary act of refusing access to the plant for the furnace maintenance, they could have foreseen such a reprisal?

We restrict ourselves to these matters since in all other respects we agree with the holding of our colleagues, and would affirm the referee's decision. We believe that the first question should be answered in the affirmative; the second in the negative.

In Benefit Decision No. 6783, we stated in part at page 7:

> ". . . the purpose of section 1262 of the code is to preserve the status quo of the parties during the course of a labor dispute so that at its cessation they will stand in the same relation to each other as at the beginning so far as the payment of unemployment benefits under the code is concerned . . . ."

Neutrality in trade disputes means to give neither side an advantage - to neither reward nor punish by awarding or denying unemployment insurance benefits for independent acts voluntarily taken by either side during the trade dispute affecting the terms and conditions of employment. The proper holding in the instant case must thus be founded on an understanding and application of the principle of proximate cause.

The result to which we are unalterably opposed in this case, however, is reached by tenuous inference based upon circumstances, including those in connection with the furnace maintenance, not fully a matter of record before us. Inferences are made in order to ultimately conclude that throughout the pendency of strike action, and beyond, particularly on March 6, 1968, and on or about March 23, 1968, the claimants first denied and then offered their services as a strategic move knowing full well that the employer was in no position to utilize their services as of the latter date. (cf. Benefit Decision No. 6757)

We believe, however, that the test set forth in Mark Hopkins, Inc. v. California Employment Commission (1944), 24 Cal. 2d 744 at 748 has been met - there was a break in the causal connection between the trade dispute and the claimants' unemployment in the instant case. The NAMD and P & M workers who were unable to return to work until the date the issues were settled at the national level should not be disqualified beyond the week ending March 30, 1968. As the Court commanded in Bunny's Waffle Shop v. California Unemployment Commission (1944), 24 Cal. 2d 735, we must reject the employer's contention and conclude that, since the claimants were the victims of changed conditions

resulting from an occurrence during the trade dispute after they desisted from strike action, they can only be disqualified from benefits by looking to the true cause of their unemployment beyond termination of their strike action. In the analogous case cited, changing of work schedules and other alterations in the conditions of employment were found to be the true causes of the claimants' unemployment.

In the instant case we would likewise conclude that the employer's independent exercise of its prerogative to completely shut down operations and extend the claimants' unemployment beyond termination of strike action and settlement of all issues at the national level was a superseding intervening act breaking the chain of causation between the claimants' original act of walking off the job and their evident ability to otherwise return to work and full production at the conclusion of the national settlement and signing of the new agreement.

The language of the court in Bunny's Waffle Shop is, despite differences in the circumstances leading to the loss of employment, germane to the present discussion. At 24 Cal. 2d 740-741, the California Supreme Court stated:

> ". . . When the new conditions of work were finally announced by the employers, they were not offered as bona fide proposals for the continued operation of the employers' places of business, but were imposed for the sole purpose of coercing the unions into bargaining collectively with the employers' representative and were to continue only until the unions agreed to do so. Admittedly they were an economic weapon designed to compel compliance with the employers' demands, and when claimants left their work, they left because of this economic weapon and not because of the trade dispute then in existence. The fact that the trade dispute was unquestionably the motivating cause of the employers' acts does not establish any direct causal relation between the dispute and the employees' leaving of work."

Again, and for emphasis, the claimants' original refusal to allow the furnace contractor ingress to the plant until March 22 for the purpose of beginning maintenance work on the furnace was only "the unarticulated threat of economic coercion" spoken of in Coast Packing Company v. California Unemployment Insurance Appeals Board (1966), 48 Cal. Rptr. 854, 410 Pac. 2d 358 (rehearing denied March 2, 1966), and should not, once pickets were pulled from the jobsite on March 22, be construed as the proximate cause of whatever occurred thereafter.

To convincingly apply any principle other than proximate cause to the factual matrix of this case is to embrace either the "work stoppage" rule or concept that a trade dispute may be prolonged due to a shutdown or startup operation caused by such trade dispute. The legislature and courts of this jurisdiction have rejected both.

To sum up, the union denied an advantage to the employer during the strike, an advantage because after the trade dispute had terminated furnace repair would have meant layoff of workers. Beginning of furnace maintenance six days before national negotiations were concluded was another convenience to the employer. An end to the trade dispute earlier than anticipated was a fortuity for which the claimants are now penalized. To expect better than the best of which the circumstances will permit is not only bad logic, it is bad law. One thing and one thing alone is clear: The claimants were absolutely foreclosed from returning to other than part-time work once management decided to conduct its furnace maintenance. (cf. Ruberoid Company v. California Unemployment Insurance Appeals Board (1963), 59 Cal. 2d 73, 27 Cal. Rptr. 878, 378 Pac. 2d 102) All arguments attacking the claimants' good faith and refusal to make concessions are thus beside the point insofar as benefits for the week ending April 6, 1968 are concerned. From that point it would, under the best of which circumstances permitted, have been futile for them to have offered their service to an employer who by then had exhausted even stopgap work.

LOWELL NELSON

DON BLEWETT